Decoding Data Privacy

Vendor Contracting at the Intersection of Employment & Commercial Litigation

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Seyfarth Shaw LLP

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Agenda

1 | Telephone Consumer Protections Act (“TCPA”)

2 | California Invasion of Privacy Act (“CIPA”)

3 | Cybersecurity and Data Breach

4 | Illinois Biometric Information Privacy Act (“BIPA”)

5 | Illinois Genetic Information Privacy Act (“GIPA”)

6 | Key Takeaways for U.S. Vendor Contracting

7 | Cross-Border Considerations

TCPA

Telephone Consumer Protection Act (TCPA)

Overview

The Basic Restrictions and Requirements

- No calls or texts to a **cellular phone** using any **automatic telephone dialing system** or an **artificial** or **prerecorded voice** the call is made:
  - For “emergency purposes”
  - With the prior express consent of the called party
- No calls to a **residential telephone line** using an **artificial or prerecorded voice** without prior express consent unless an emergency purpose or is otherwise exempted.
- No **telephone solicitations** to individuals on the **DNC** unless there is an established business relationship or prior permission
- Honor **reasonable request to opt out** within 10 business days
- No telephone solicitations before 8 am or after 9 pm

Telephone Consumer Protection Act (TCPA)

Litigation Trends

TCPA Trends

- No longer seeing a lot of claims based on use of an auto-dialer
- Trend in “after hour” marketing cases has slowed
- Rise in pre-recorded voice cases based on new AI technologies
- Increase in DNC cases where there is a lack of consent due to numbers being re-assigned
- Rise in demands and litigation related to failures to honor opt out requests
  – Especially in the text messaging context

Telephone Consumer Protection Act (TCPA)

Vendor Considerations

Vendor Considerations

- Understand the technology being utilized and whether it could qualify as an auto-dialer under TCPA
- Communicate with vendor about who is collecting consent and how that information is maintained
- Understand the different TCPA requirements depending on the technology being utilized (pre-recorded calls, texts, etc.)
- Know what mitigation efforts the vendor is covering and what will need to be covered internally
  - Reassigned number review
  - National Do Not Call Registry
  - Internal do not call list
  - After-hour calls/texts
- For consent-based SMS databases, know how incoming messages are analyzed and treated for opt out purposes
- Do not rely solely on the vendor for policies and training – have internal procedures as well.
- Make sure the vendor is aware of the states in which it is contacting individuals
- Insurance and indemnity

CIPA

Website Tracking Technology Litigation - Overview

State and Federal wiretap and other data privacy-based statutes

Federal Wiretap Act

California Invasion of Privacy Act, it is illegal to intentionally record or eavesdrop on telephone calls without the consent of all parties.

- **California Penal Code 631** – third party wire-tapping and in-transit interception of content
- **California Penal Code 632** – monitoring or recording confidential communications
- **California Penal Code 638.51** – Trap and trace – routing/addressing information
- **California Penal Code 637.2** - $5,000 statutory damages per violation

Other two-party consent states statutes or statutes requiring consent for transfer or sharing of data (VPPA, GIPA)

Website Tracking Technology Litigation – *Litigation Trends*

- Targeting websites utilizing any tracking technology, analytics tools, data aggregation tools, AI tools where the data is sent to a third party and where there is no cookie management system on the website to make disclosures or capture consent

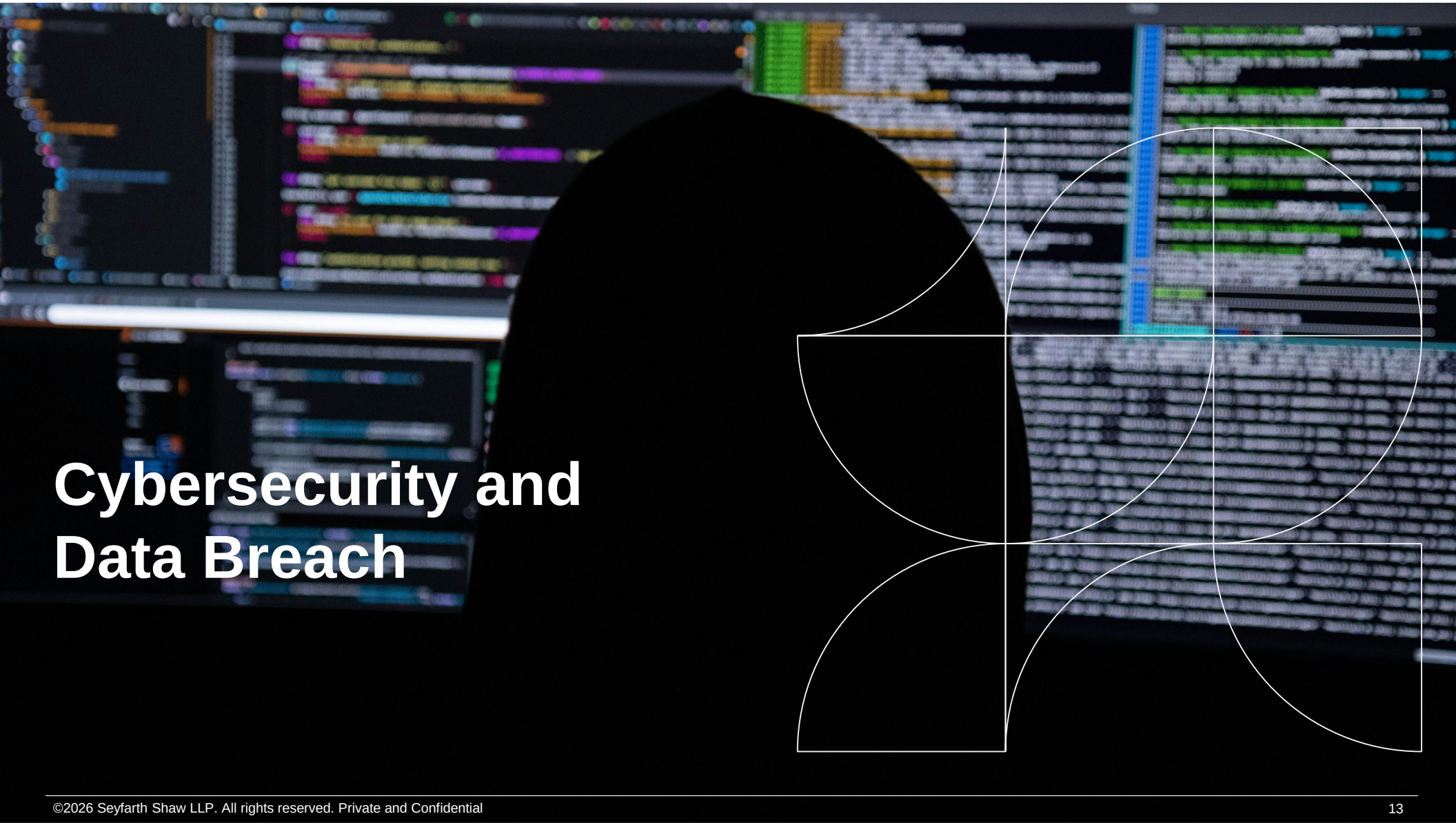
- Targeting websites utilizing tracking technology through pixels or cookies where the cookie management system is not operating consistent with the user's selections

- Looking for technology that is operated by big tech and marketing companies where the data could be used through their own algorithms for other purposes

- Looking for technology to be embedded in particularly sensitive or substantive parts of websites (password protected portals, search bars, check-out processes)

Website Tracking Technology Litigation – *Vendor Considerations*

- There could be lots of different vendors at play here:
  - Website operators
  - Digital marketing partners
  - IT partners or service partners controlling certain functionalities of the website (checkout, chatbots, search functions)
  - Cookie management vendors
- Legal considerations and risk in terms of:
  - What technology is being implemented and how it is configured
  - What data is being sent through the technology
  - What the vendors/partners are permitted to do with the data
  - What security measures could be implemented to restrict certain types of data or anonymize the data
  - Indemnification and insurance



Cybersecurity and Data Breach

Cyber Security

Vendor Considerations

Vendor Considerations

- **Scope of data and processing.** Identify the categories of data the vendor may process

- **No secondary use.** Prohibit/limit other uses of customer/ employee data outside the contracted services without approval.

- **Security controls appropriate to the vendor.** Require Multi-factor authentication (MFA), encryption, least privilege, named-user accounts, logging, access reviews, vulnerability management, data segregation, secure deletion, and reasonable assurance such as SOC 2, ISO 27001, or equivalent evidence where appropriate.

  – **Subcontractor controls**

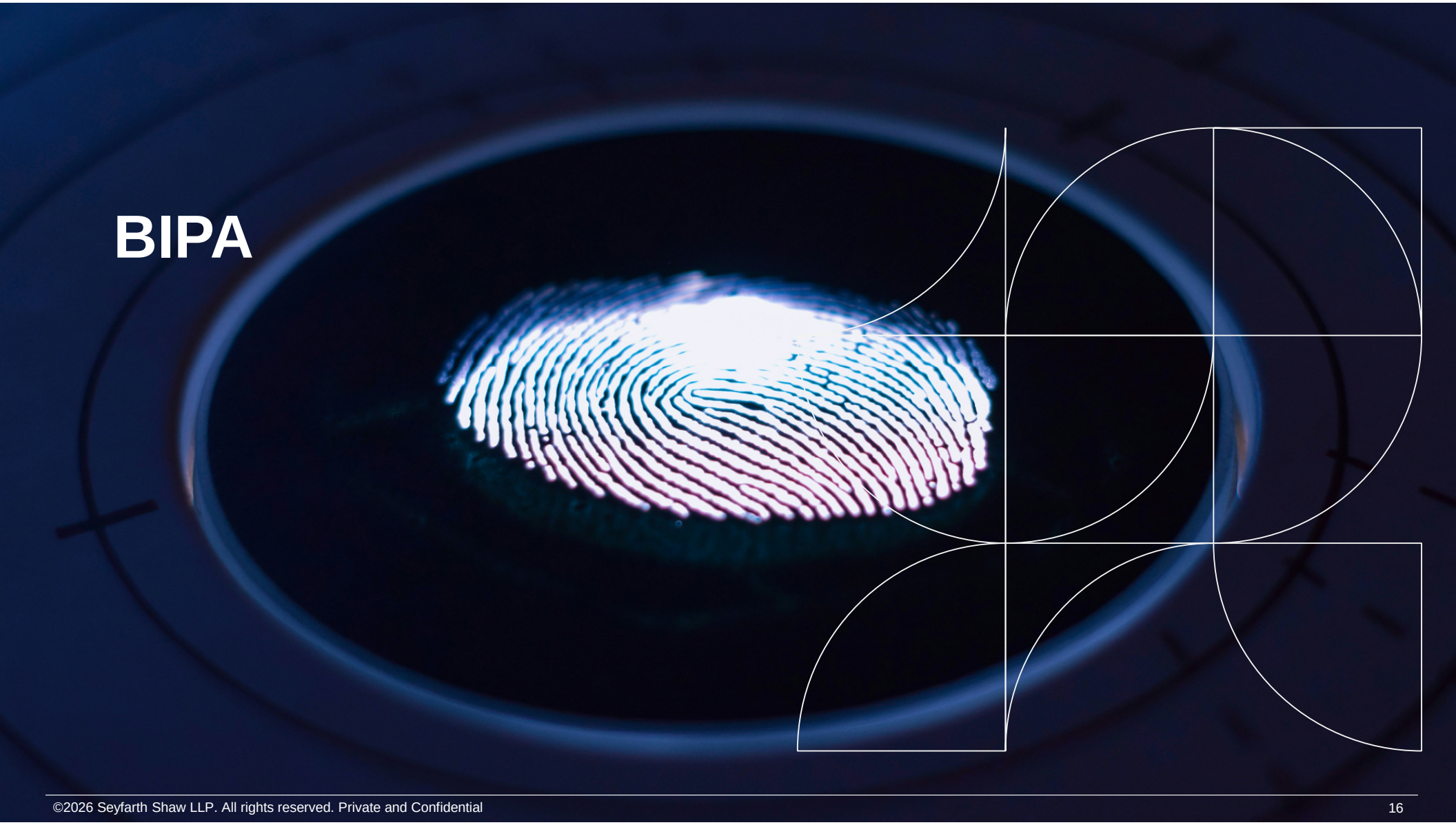
Cyber Security

Vendor Considerations

Vendor Considerations

- **Incident notice and cooperation.** Require prompt (24/48/72 hr) notice of actual or suspected unauthorized access, disclosure, loss, or other data incident and include:
  - **Operational escalation**
  - **Control over legal determinations and notices**
  - **Forensic preservation and cooperation**
- **Risk allocation.** Include vendor responsibility for reasonable breach-response costs caused by its failure, and carveouts or higher caps for higher risk incidents
- **Liability, indemnity, and insurance**

BIPA



Illinois Biometric Information Privacy Act (BIPA) Overview

- Enacted in 2008
- Only standalone biometric privacy law in U.S. with private right of action, liquidated damages, and attorneys' fees.
- More than 2,000 lawsuits filed since enactment – majority in and after 2019
  - (following *Rosenbach* standing decision).
- Well over $1B in BIPA settlements and one verdict.
- "Biometric Information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual.
- "Biometric Identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand of face geometry.
- Liquidated damages of $1,000 for each negligent violation or $5,000 for each reckless violation. ("may" recover)

BIPA Requirements

- **14/15(a) –** develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric information **or** identifiers.
- **14/15(b) –** provide written notice and obtain written consent before capturing, collecting, purchasing, receiving through trade, or otherwise obtaining a person's biometric information **or** identifiers.
- **14/15(c) –** prohibit the sale, lease, trade or profit of a person's biometric information.
- **14/15(d) –** prohibit the disclosure of biometric information or identifiers without consent or as required under the Act.
- **14/15(e) –** store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry and in a manner that is the same as or more protective than the manner in which other confidential and sensitive information is stored, transmitted, and protected.

BIPA Litigation Trends

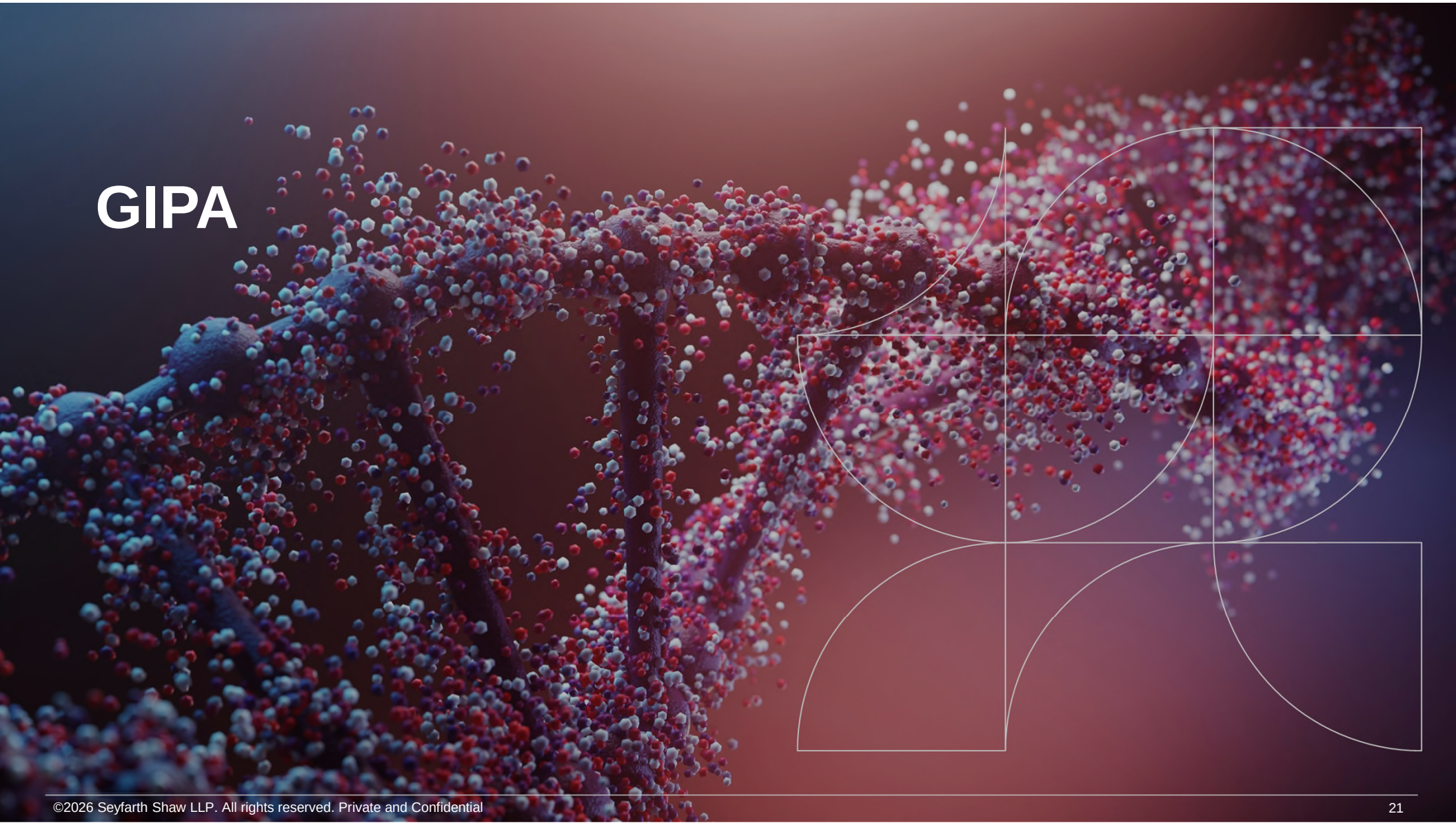
- Hourly employees in all industries using finger scan time clocks (restaurants, hotels, etc.)
- Supply chain logistics companies using driver facing cameras
- Retailers offering online virtual try-on features
- Medical providers using finger scan medicine cabinets
- Security identification screenings
- Facial recognition in retail stores (Clearview)
- Automotive industry (voice command & driving assistance)

Illinois Biometric Information Privacy Act (BIPA)

Vendor Considerations

- Define the technology and data flow.
- Allocate notice and consent responsibilities.
- Restrict use and disclosure.
- Establish retention and deletion requirements.
- Require appropriate security and incident response.
- Address audit rights and risk allocation.

GIPA



Illinois Genetic Information Privacy Act (GIPA) - Overview

- Employer-specific provisions (limited, imprecise)

(410 ILCS 513/25)
Sec. 25. Use of genetic testing information by employers

(c) An employer, employment agency, labor organization, and licensing agency shall not directly or indirectly do any of the following:

(1) solicit, request, require or purchase genetic testing or genetic information of a person or a family member of the person, or administer a genetic test to a person or a family member of the person as a condition of employment, preemployment application, labor organization membership, or licensure

Illinois Genetic Information Privacy Act (GIPA) - Overview

Two decades of mostly *silence . . .* until 2017

- GIPA is very similar to BIPA--mimics language, structure, and damages provisions.
- Focus of the statute is on the use of genetic testing to determine suitability for insurance coverage or employment.
- Like BIPA, it too, contains no statute of limitations, and no definition of what constitutes a violation of the statute.
- **Notably, consent is NOT a defense**. Under the strict wording of the statute, arguably the collection of the genetic information constitutes the statutory violation.
- GIPA provides minimum statutory damages of $2,500 per negligent violation and maximum statutory damages of $15,000 per intentional violation or actual damages, whichever is greater.
- Federal counterpart, *Genetic Information Nondiscrimination Act* (GINA) passed in 2008
  - "Genetic information"
    - "Family medical history"
  - "Condition of employment"

Illinois Genetic Information Privacy Act (GIPA)

Litigation Trends

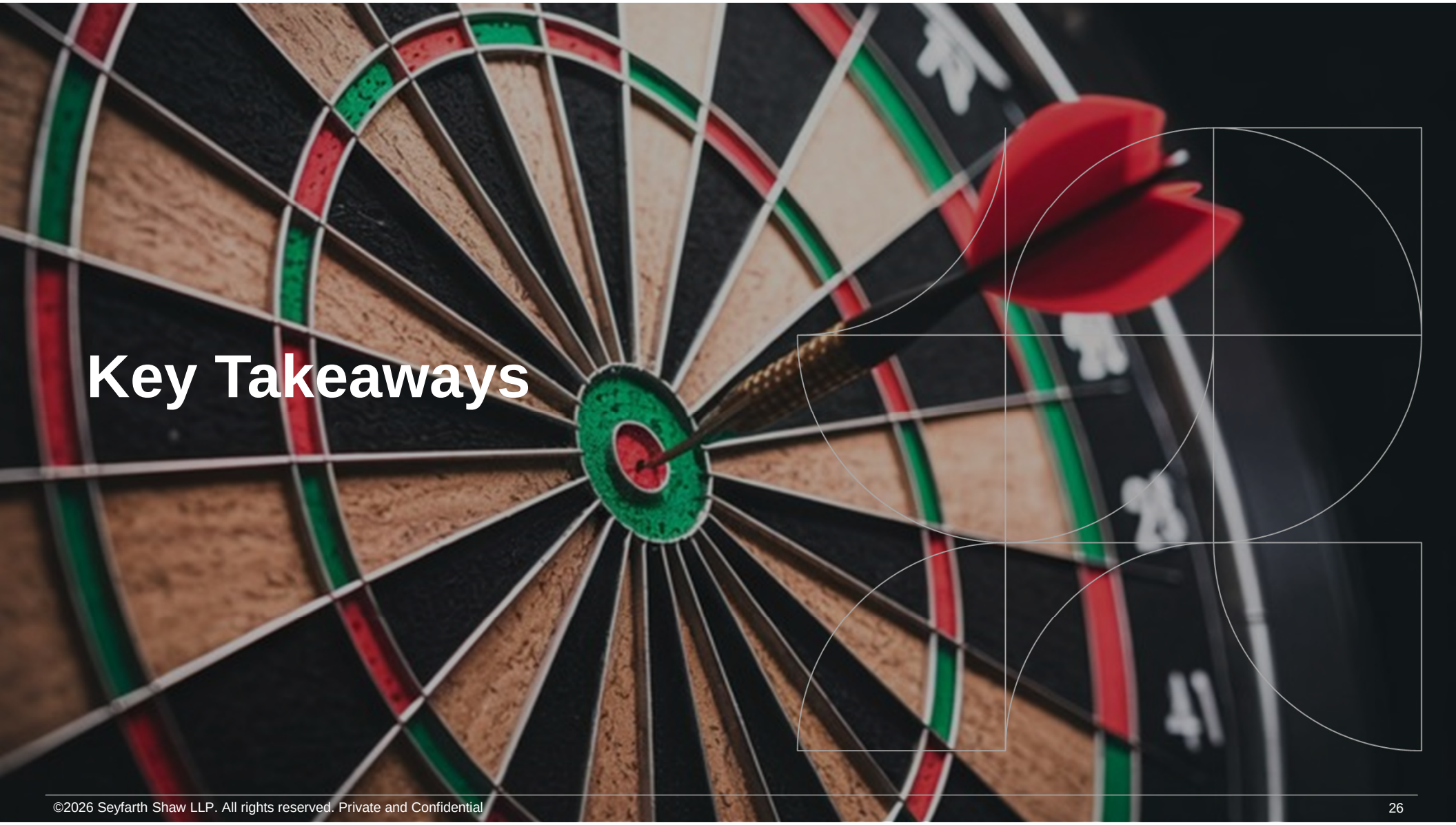
- Challenged employment practices
  - Pre-employment medical questionnaires
  - Post-offer medical screenings
  - Occupational health and wellness programs
  - Ongoing medical surveillance
- Targeted industries
  - Transportation and logistics
  - Common carriers
  - Healthcare, pharmaceutical companies
  - Manufacturing employers
- Role of employers *versus* vendors

Vendor Considerations

- Vendors and agreements to consider
  - Occupational health
  - Medical examination providers
  - Wellness program provider
  - Targeted screening services

- Employer Protections
  - Legal compliance
  - Limited data transmission to employer
  - Limited employer access to data
  - Indemnification
  - Require arbitration provision in vendor agreements
  - Control of tools, protocols, staffing

Illinois Genetic Information Privacy Act (GIPA)



Key Takeaways

Key Takeaways for U.S. Vendor Contracting

- Indemnification
- Insurance
- Choice of law and venue
- Arbitration
- Party responsible for legal compliance (and placement of clause within agreement)
- Limits on liability- efforts of third-party providers to absolve themselves of obligations
- Agency theory – alignment of practice and language regarding control of technology and practices
- Data breaches – storing data in different places to reduce risk

Cross-Border Considerations

Cross-Border Considerations

- Understand where the data goes.
- Identify transfer and localization requirements.
- Evaluate the destination country and access risks.
- Control sub-processors and onward transfer.
- Coordinate operational responsibilities.
- Address restricted countries and contractual risks.

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Questions?

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